STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 8, 2000
v	No. 205978 Recorder's Court
MAURICE NEAL WILLIAMS, Defendant-Appellant.	LC No. 96-007251

Before: Whitbeck, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant Maurice Williams appeals as of right. A jury convicted Williams of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1); MSA 28.788(7)(1) (assault with intent to commit CSC I). The trial court sentenced Williams, who was on parole when he committed this offense, as a third habitual offender,[1] MCL 769.11; MSA 28.1083, to twenty-two to forty years in prison for the home invasion count and a consecutive term of eight to twenty years in prison on the assault with intent to commit CSC I offense. MCL 750.110a(8); MSA 28.305(a)(8); see also MCL 768.7a(2); MSA 28.1030(1)(2). We affirm his convictions but vacate his sentence and remand for an unenhanced sentence.

I. Basic Facts

The prosecutor alleged that Williams broke into a house in Detroit in the early morning hours of August 28, 1996 after the homeowner, her two sons, and her mother, who was visiting at the time, had gone to bed. According to their trial testimony, Williams terrorized both women in various rooms of the house before he forced the homeowner, whom he had already attempted to sexually molest, to drive him to another location with the property he stole from her. The police investigation revealed evidence that someone had broken into the house through a second-floor window, which the person accessed using a ladder that still rested against the house the day

[1] The judgment of sentence erroneously refers to MCL 769.13; MSA 28.1085 as the applicable habitual offender statute. The length of the sentence and the trial court's comments at sentencing reveal that it actually used MCL 769.11; MSA 28.1083 to enhance Williams' sentence.

after the crime. Because there are a number of issues on appeal and many of them concern complicated procedural questions, we describe additional facts below when necessary.

II. Self-Representation And The Right To Counsel

A. Standard Of Review

Williams argues that the trial court violated his constitutional right to counsel when it permitted him to represent himself at trial. This Court ordinarily reviews the whole record to determine if the defendant properly waived his or her right to trial counsel under the Sixth Amendment. See generally *People v Richert*, 216 Mich App 186, 189; 548 NW2d 924 (1996); *People v Stephens*, 71 Mich App 33, 39; 246 NW2d 429 (1976). In essence, this is a de novo review because this Court does not defer to the trial court's findings and conclusions on this waiver issue.

B. Overview

Whether the trial court denied Williams his Sixth Amendment right to counsel is a particularly difficult question to answer in this case for at least two reasons. First, Williams asserted his right to counsel and his contrary right to represent himself a number of times, making it difficult to sort out his wishes concerning counsel. Second, as becomes clear from the facts we outline below, this issue is closely related to Williams' desire to delay trial as long as possible. Accordingly, when we look at Williams' alternating invocations of his right to counsel and right to self-representation, we pay scrupulous attention to the details of his statements to the trial court and consider how his desire for delay affected his decision to assert those rights.

C. Procedural History

The trial court appointed Kerry Jackson to represent Williams in this case. On the day originally set for jury voir dire, April 21, 1997, Jackson informed the trial court about a discovery problem that he and the prosecutor had just resolved. In the course of explaining this turn of events to the trial court, Jackson also noted that he and Williams had disagreed about Williams' access to discovery materials, that Williams had repeatedly expressed his desire to postpone trial, and that Williams had rejected the idea of a plea bargain. The trial court responded to this statement by asking Jackson if he was ready to proceed to trial even with the new information he had obtained from the prosecutor. Jackson replied:

> I'm prepared to go to trial. That's the other thing, I forgot to mention. When I talked to my client yesterday, at the Wayne County Jail, he indicated to me that he wanted to know if it was possible that he could represent himself.

Apparently interpreting Jackson's comments about postponing trial as a motion to adjourn, the trial court then declined to delay trial, but indicated that, if necessary, it would give Jackson time to review the newly discovered materials before any cross-examination.

Responding to Jackson's assertion that Williams wanted to represent himself at trial, the trial court said to Williams, "I need to advise you of certain dangers in that, and make sure you

fully are aware of the consequences, potential consequences and dangers of representing yourself. But before we go there, . . . what [plea] offers were made to Mr. Williams on this case." The prosecutor stated that the only plea bargain still available was ten to twenty years in prison and Jackson said that he told Williams about that offer. The trial court asked Jackson if there was "any resolution . . . short of trial," at which point Williams spontaneously interjected:

> It's no resolution.
>
> *Number one, I wish to represent myself.*
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> Number two, I wish to have an adjournment because, as my counsel has stated before, I haven't received all of my discovery. And I have just now received some of it and I don't even know if I have all of it, not to mention [the discovery materials on an unrelated case] . . . I don't have all my discovery here.
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> THE COURT: We're not talking about the other case. We're just talking about [this] . . . case.
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> THE DEFENDANT: I'm not even sure I have all that. And I did receive some of it this morning, which is on the day of trial. I haven't even had the chance to review any of this.
>
> *Number two, like I said before –*
>
> THE COURT: You need to stand.
>
> THE DEFENDANT: *Number two, I want to represent myself.* Also, jury trial – like I said, I just now received some of this discovery, which I should have been [sic] had. I done wrote four or five letters to this Court a long time ago explaining my situation, and I just now received it. And I don't even know if I have all of it. So, therefore, I'm asking for an adjournment. [Emphasis supplied.]

The prosecutor then explained why there was an inadvertent delay in discovery and Jackson indicated that he and Williams had copies of all the newly provided discovery materials.

Next, the trial court engaged in a colloquy with Williams to inform him of the dangers of self representation and to determine if he intended to waive his right to counsel. The trial court first ascertained Williams' age, twenty-seven years old, and level of education, which included a general equivalency degree and an associate's degree in culinary arts. The trial court informed Williams that he had a lawyer who had graduated from college, had passed the bar exam, knew how to object to witness testimony and opposing counsel's questioning, was trained in the rules of evidence, and knew how to make legal arguments, including opening statements and closing arguments. After listing each advantage Jackson had to offer Williams, Williams explicitly indicated that he understood what the trial court was saying. The trial court also remarked, and Williams agreed, that Williams had not had any similar training. The trial court then said:

> All right.

So, knowing all of that, you still wish to –

THE DEFENDANT: Yes, I do.

THE COURT: – represent yourself?

THE DEFENDANT: Yes.

THE COURT: No one has forced you to do this? This is what you want to do?

THE DEFENDANT: Correct.

THE COURT: All right.

Following this colloquy, it became apparent that Williams still intended to delay trial as much as possible. Specifically, Williams refused to change from his jail uniform into civilian clothing, which most defendants prefer to wear in front of a jury. See *People v Turner*, 144 Mich App 107; 373 NW2d 255 (1985). Williams explained that he was taking this action "[b]ecause I had asked your Honor to adjourn and for a specific reason he chose to deny it."

Jackson, understandably, used Williams' conduct concerning the clothing and insistence on proceeding in propria persona to demonstrate why he had doubts about Williams' competency. As a result, the trial court agreed to adjourn trial for one day to hold a competency hearing. Jackson commented that, regardless of the competency review, the delay alone would likely satisfy Williams by giving him time to read the new discovery materials. Williams agreed that one day would be enough time for him to read those materials and, at the end of the hearing, withdrew his request for a competency hearing. This caused the prosecutor to remark that Williams had secured his adjournment despite the trial court's earlier ruling. Although the trial court had warned Williams of the dangers of self-representation and secured his assent to proceed in propria persona, the trial court never specifically ruled on Williams' request to represent himself at any time on April 21.

When the parties reconvened the next day, April 22, 1997, Williams still had not changed into civilian attire. Jackson immediately brought the adjournment issue back to the trial court's attention and the trial court clearly declined to permit any further adjournments. Jackson then informed the trial court:

Mr. Williams has now informed me that he wants to ask for a new lawyer on this case.

MS. WALKER [the prosecutor]: He's representing himself. How's he going to get a new him?

MR. WILLIAMS: *I changed my mind about representing my case*.[2] I want a new attorney. [Emphasis supplied.]

The trial court did not ask Williams any questions about whether he wanted an attorney and, if he did, if he wanted someone other than Jackson to represent him. Ironically, Jackson argued that he should not represent Williams because Williams had been so adamant about asserting his right to self-representation. After determining that Jackson was prepared to try the case, the trial court, in effect, honored Williams' assertion that he had changed his mind about representing himself, noting:

> We've wasted far too much time on this trial, and haven't gotten anywhere. This man has a right to have effective representation, not the lawyer of his choice. And yesterday you said you [Jackson] were prepared, today you will proceed, and do the very best you're able to do. I'm not going to allow Mr. Williams to manipulate this Court through game playing and the like. We're moving forward. . . .

Jackson functioned as defense counsel during voir dire, asking the venire members questions. However, following voir dire, Jackson informed the trial court that Williams wished to make his own opening statement and concluded his remarks to the trial court by saying, "It's either going to be I'm going to represent him for trial or he's going to represent himself for trial." This prompted the trial court to ask Williams, again, whether he wanted to represent himself:

> THE COURT: Is it your decision to represent yourself throughout this trial?
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> MR. WILLIAMS: *Yes, it is.*
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> THE COURT: And yesterday I advised you of the dangers against self representation; do you remember the advice I told you?
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> MR. WILLIAMS: Yes.
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> THE COURT: In spite of that, not knowing the rules of evidence, not being trained in the law, not knowing legal arguments and legal theories, you still want to represent yourself?
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> MR. WILLIAMS: That's correct. But I also just want to put on the record that I'm still asking for an adjournment.
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> THE COURT: And I'm still denying it.

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[2] Another version of the same transcript indicates that Williams said, "I changed my mind about representing myself on this case." Despite our efforts to secure an accurate transcript, the court reporter was not able to clarify which version of Williams' statement is correct. Regardless, these statements are sufficiently similar for us to conclude that Williams asked for a new attorney on April 22, 1997.

MR. WILLIAMS: All right.

THE COURT: He will represent himself. You will second chair him, Mr. Jackson. [Emphasis supplied.]

The trial court then summoned the jury and noted that Williams was exercising his right to represent himself and had an attorney available to assist him. After the prosecutor gave her opening statement, Williams addressed the jury and stated, among other thing, "My position today is I'm representing myself because I have that right and I also have that right to investigate all evidence that's being used against me."

During trial, Williams represented himself by cross-examining several prosecution witnesses. Jackson interjected at times in an effort to assist Williams. Jackson also made a number of legal arguments to the trial court, including a request for specific jury instructions. The jury convicted Williams. Following his conviction, Williams obtained new counsel. With his new attorney's assistance, Williams filed a timely motion asking for a new trial, a *Ginther*[3] hearing, and for resentencing pursuant to MCR 7.208(B)(1). With respect to the motion for a new trial or a *Ginther* hearing, Williams asserted that the trial court's "failure to adequately explore the option of appointing new counsel" to represent him meant that "self-representation was improvidently granted." After briefing and oral argument, the trial court denied Williams' motions.

D. Legal Foundations

In Michigan, a criminal defendant's right to counsel has two important constitutional sources. The best known source is the Sixth Amendment to the United States Constitution, which provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defence." Congress codified this principle as it applies to federal courts in 28 USC 1654, which prescribes that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." The 1963 Michigan Constitution includes language similar to the Sixth Amendment in article 1, § 20, which states that "[i]n every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his or her defense . . . ." This right to counsel, as opposed to the right to counsel that springs from the Fifth Amendment and Const 1963, art 1, § 17, exists "at or after the initiation of adversary judicial proceedings against the accused by way of a formal charge, preliminary hearing, indictment, information, or arraignment." *People v Bladel*, 421 Mich 39, 52; 365 NW2d 56 (1984). This right to counsel is so fundamental that it "does not depend upon a request by the accused . . . ." *Id*., citing *Brewer v Williams*, 430 US 387, 404-405; 97 S Ct 1232; 51 L Ed 2d 424 (1977).

While 28 USC 1654 does guarantee the right to proceed in propria persona in federal courts, there is no express provision in the United States Constitution extending the right to self-representation. As a result, some courts initially struggled to determine whether the principle

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

that a defendant cannot be forced to accept legal counsel in all situations was, in fact, a constitutional guarantee included in the Sixth Amendment right to counsel. See *Carter v Illinois*, 329 US 173, 174-175; 67 S Ct 216; 91 L Ed 172 (1946). Apparently guided by the same concern expressed in the well-worn adage that the person who acts as his own attorney has a fool for a client, see generally *People v Ahumada*, 222 Mich App 612, 616-617; 564 NW2d 188 (1997), some courts were first inclined to hold that a defendant does not have a federal constitutional right to self-representation, see *People v Sharp*, 7 Cal 3d 448; 103 Cal Rptr 233; 499 P 2d 489 (1972). However, the United States Supreme Court clarified that the right to self-representation is a Sixth Amendment guarantee in its decision in *Faretta v California*, 422 US 806, 819-820; 95 S Ct 2525; 45 L Ed 2d 652 (1975), in which the Court reasoned:

> It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him" and who must be accorded "compulsory process for obtaining witness in his favor." Although not stated in the Amendment in so many words, the right to self-representation – to make one's defense personally – is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.
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> The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment shall be an aid to a willing defendant – not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. [Citations omitted.]

Whether the right to self-representation exists as a matter of state law has not similarly troubled modern Michigan courts because the 1963 Michigan Constitution, art 1, § 13, explicitly states that "[a] suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney." MCL 763.1; MSA 28.854 reconfirms this right to self-representation, saying that "[o]n the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself . . . ."

Despite the fact that these rights to counsel and self-representation clearly exist under the state and federal constitutions, two other legal principles define the length and breadth of these rights. First, "courts 'indulge every reasonable presumption' against waiver of fundamental constitutional rights," such as the right to counsel. See *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938), quoting *Aetna Ins Co v Kennedy*, 301 US 389, 393; 57 S Ct 809; 81 L Ed 1177 (1937). In essence, we presume that every criminal defendant intends to exercise the right to counsel, which explains why defendants need not take any special steps to assert this right. See *Bladel*, *supra* at 52. Second, there is no "absolute" right to self-representation under state or federal law, which again reinforces the idea that proceeding with the assistance of counsel is the "default posture" for defendants in criminal cases. See *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976).

At a more pragmatic level, case law and the court rules provide the legal framework that defines how a defendant exercises the right to counsel and the right to self-representation because exercising one right comes at the expense of waiving the other right. *People v Adkins (After Remand)*, 452 Mich 702, 720; 551 NW2d 108 (1996). Accordingly, courts must take special care to ensure that defendants make only knowing, voluntary, and intelligent waivers of the right to counsel in order to assert the right to self-representation. See generally *Ahumada*, *supra* at 614.

Anderson, *supra* at 367-368, provides the primary structure for determining whether a defendant's alleged waiver of the right to counsel is constitutionally sound. First, the defendant must assert the right to self-representation "unequivocally." *Id*. at 367. Second, the trial court must determine whether this waiver of the right to counsel is knowing, intelligent, and voluntary. To satisfy this requirement, the trial court must warn the defendant "of the dangers and disadvantages of self-representation, so that the record will establish that he [the defendant] knows what he is doing and his choice is made with eyes open." *Id*. at 368. Third, the trial court must determine whether the "defendant's acting as his own counsel will not disrupt, unduly inconvenience and burden the court and the administration of the court's business." *Id*.

MCR 6.005 requires a trial court that is in the process of determining whether a defendant is waiving the right to counsel to follow a particular procedure, essentially giving greater detail to the considerations *Anderson* identified in the second part of its analysis. MCR 6.005 provides in relevant part:

> (D) Appointment or Waiver of a Lawyer. If the court determines that the defendant is financially unable to retain a lawyer, it must promptly appoint a lawyer and promptly notify the lawyer of the appointment. The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
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> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
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> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.
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> (E) Advice at Subsequent Proceedings. If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,
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> (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or

(2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or

(3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

In substance, MCR 6.005(D) ensures that a defendant has all the information necessary to make a knowing, intelligent, and voluntary waiver of the right to counsel, while MCR 6.005(E) provides a mechanism for determining that the defendant's decision to proceed in propria person remains unequivocal. Accordingly, *Adkins*, *supra* at 722, clarifies that, in addition to the three-part analysis identified in *Anderson*, a trial judge must "create a record that establishes the trial court's compliance with the court rules and *Anderson* during the initial waiver process." However, "[a] particular court's method of inquiring into and satisfying these concepts [outlined in the court rules and *Anderson*] is decidedly up to it, as long as the concepts in these requirements are covered." *Id*. at 725. In effect, the trial court must "substantially comply" with *Anderson* and the court rules when determining whether the defendant waived his right to counsel; a "litany approach" that requires mechanical execution of the court rules is unnecessary to protect a defendant' right to counsel. *Id*. at 725-727; see also *People v Dennany*, 445 Mich 412, 439; 519 NW2d 128 (1994).

E. Williams' Requests To Proceed In Propria Persona

Williams makes two arguments in this appeal attempting to demonstrate that the trial court erred in granting his repeated requests to proceed in propria persona. We do not find these arguments persuasive.

First, Williams contends that his request to represent himself was equivocal and a product of Jackson's ineffective assistance preceding trial. Instead of allowing him to go to trial representing himself with Jackson as "second chair," Williams claims the trial court should have explored the option of appointing a new attorney. However, we do not read the transcripts as suggesting that Williams' decision to assert his right to represent himself was equivocal and resulted from Jackson's pretrial performance.[4]

On April 21, 1997, Williams spontaneously told the trial court that he wanted to represent himself at trial. He mentioned this not once, but twice. Subsequently, when the trial court

[4] One could conclude that Jackson's pretrial performance was far from stellar. However, interestingly enough, Williams does not claim that Jackson's pretrial conduct constituted ineffective assistance of counsel, even though he raises an ineffective assistance of counsel claim in this appeal. Further, he has not provided any authority suggesting that mere dissatisfaction with appointed counsel is enough to prove that a trial court should not allow a defendant to represent himself after rendering an otherwise knowing, voluntary, and intelligent waiver of the right to counsel. *Adkins*, *supra* at 724, noted that deciding whether a defendant waived the right to counsel can be difficult when the defendant is dissatisfied with appointed counsel. However, the Court in *Adkins* did not suggest that it is impossible to make a proper waiver under these circumstances.

engaged in the colloquy concerning the dangers of self-representation with Williams, Williams reconfirmed on the record that he wanted to proceed in propria persona two additional times. Given his other conduct, including his refusal to change clothing, continued insistence that the trial court delay the trial, and ultimate decision to forego a competency review once the trial court agreed to give him a day to read the new discovery materials, we are left with the unmistakable impression that this initial decision to waive the right to counsel was unequivocal and was a part of his attempt to manipulate the proceedings. Williams specifically continued these tactics to delay trial on April 22, 1997, the day he said he wanted a new attorney. Moreover, he confirmed that he wanted to represent himself two additional times, even after he claimed to want a new attorney and the trial court reminded him about the dangers of self-representation. Not only was Williams' final statement on the record concerning his desire for representation at trial a clear "yes," meaning he wanted to represent himself, he specifically informed the trial court that he was seeking an adjournment in that same statement.

These facts lead to two logical inferences. First, after voir dire was concluded, Williams unequivocally wanted to represent himself, and the earlier request for a new attorney was a (failed) ploy to delay trial. In other words, once Williams knew the trial court was not inclined to grant any further delays, he made clear that his true intention was to represent himself at trial, an intention he had made known the previous day. As in *Adkins, supra* at 729-730, this patent manipulation of the court process "bolsters" the trial court's conclusion in this case that there was a proper waiver of the right to counsel.

Second, Williams argues that the trial court erroneously allowed him to proceed in propria persona because it did not explain the potential punishment for the charged offense as required in MCR 6.005(D)(1). This specific argument is part and parcel of Williams' broader contention that the trial court's inquiry into his intentions to waive the right to counsel was inadequate. Therefore, we assume that he broadly contends that his waiver of the right to counsel was not knowing, voluntary, or intelligent because of this failure to inform him of the possible punishment in this case and what he views as the general inadequacy of the colloquy.

We agree that, during the lengthy discussions the trial court had with Williams in an attempt to define his rights and portray the risks of self-representation, the trial court never once explained "the maximum possible prison sentence for the offense, [and] any mandatory minimum sentence required by law," as the court rule required. MCR 6.005(D)(1). However, a trial court needs substantial compliance with the court rules and *Anderson*, not perfect compliance. *Adkins, supra* at 726. In *Adkins*, the Supreme Court specifically concluded that the trial court's failure to inform the defendant of the possible punishment available if he was convicted did not constitute an error requiring reversal of his conviction. *Id*. at 730-731. The Supreme Court noted that the trial court's previous efforts to inform the defendant that the charges were serious only reinforced its conclusion that the compliance, although clearly not full, was sufficient. However, the Court did not rest its conclusion on this one factor. *Id*. at 731. Accordingly, we, too, agree that if the waiver colloquy was otherwise sufficient to secure a knowing, voluntary, and intelligent waiver of Williams' right to counsel, then the trial court did not err in allowing him to go to trial with only a standby attorney.

This Court, in *Ahumada*, *supra* at 616, suggested that substantial compliance occurs when "the [trial] court engage[s], on the record, in a methodical assessment of the wisdom of self-representation by the defendant." The trial court informed Williams a number of times why it is usually ill-advised to proceed to trial without an attorney. We conclude that these efforts were adequate. The colloquy in this case outlined the distinct advantages an attorney has to offer at trial. It also highlighted Williams' lack of equivalent knowledge and skills. If Williams was at all undecided about whether he should proceed in propria persona, the trial court's colloquy would have been likely to convince him to proceed with counsel. That he did not change his mind after hearing about the skills Jackson had to offer only suggests that representing himself at trial was his true intention. More importantly, Williams' responses to the trial court's questioning indicate that he understood the trial court's warnings and specifically knew what he was giving up by representing himself. Nevertheless, he continued to insist that he be allowed to represent himself despite these risks and that he had made this decision voluntarily. This waiver was clearly knowing, voluntary, and intelligent even without the extra information about the possible punishment. The trial court substantially complied with its duties under *Anderson* and the court rules. We conclude that the trial court did not err in allowing Williams to exercise his right to represent himself at trial.

III. Fingerprint Testimony

A. Preservation Of The Issue And Standard Of Review

Williams argues that the trial court erred in allowing Officers Boggues and Puckett to testify to specific matters surrounding the fingerprint evidence in this case. Defense counsel objected to the challenged portions of their testimony and, therefore, preserved this issue for appeal. MRE 103(a)(1).

This Court reviews evidentiary issues for an abuse of discretion. *People v Honeyman*, 215 Mich App 687, 696; 546 NW2d 719 (1996). Additionally, "[w]hether a witness is qualified to render an expert opinion and the admissibility of an expert's testimony are matters within the trial court's discretion, and we review those decisions for an abuse of discretion." *Franzel v Kerr Mfg Co*, 234 Mich App 600, 619; 600 NW2d 66 (1999).

B. Officer Boggues' Testimony

After the defense cross-examined Officer Boggues regarding how fingerprints appear on different surfaces, the prosecutor asked Officer Boggues several related questions. The substance of the prosecutor's questions do seem, at least at first glance, to infringe on an area that only someone with "specialized knowledge," an expert, would be able to answer. MRE 702; see also *Franzel*, *supra* at 621. The parties do not dispute that, at the time the prosecutor asked Officer Boggues these questions, the prosecutor had neither offered him as an expert nor tried to qualify him as one pursuant to MRE 702. Thus, MRE 701 limited Officer Boggues' opinion testimony to "those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Officer Boggues was otherwise free to testify to any relevant information he had regarding the offense, only limited by the rules of evidence. See MRE 402.

On appeal, Williams argues that Officer Boggues' fingerprint testimony was in the form of an expert opinion even though he was not offered as an expert. Williams contends that he did not open the door to Officer Boggues' fingerprint testimony and that the testimony was prejudicial because it "effectively neutralized the cross-examination." Nevertheless, three factors lead to our conclusion that the trial court did not commit error requiring reversal when it allowed this testimony.

First, testimony elicited on redirect is proper if it addresses "matters raised during cross-examination." *Gallaway v Chrysler Corp*, 105 Mich App 1, 7-8; 306 NW2d 368 (1981). In this case, Williams himself opened the proverbial door to asking Boggues some technical questions appropriate for an expert when he asked the officer "[if] I put my thumb print right there on this wood, if I put my thumb print right there, you think you can lift it off?" This question clearly asked Officer Boggues to express an opinion — to rely on learning or other experience that was not likely to be within the knowledge of a lay person — in determining whether he could collect the fingerprint as evidence. See *People v Gambrell*, 429 Mich 401, 407; 415 NW2d 202 (1987). That the prosecution responded with a similarly technical question was a proper response. See *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988).

Second, Williams does not specifically identify which statements were allegedly improper expert testimony. Some testimony, although bordering on expert opinion, was likely proper under MRE 701. In *McPeak v McPeak (On Remand)*, 233 Mich App 483, 493; 593 NW2d 180 (1999), this Court explained that "lay opinion testimony is permitted when it is rationally based on the witness' perception and is helpful to a clear understanding of a fact at issue." In this case, the prosecutor's questioning regarding the relationship between fingerprints and oil on the skin appeared to be within Officer Boggues' knowledge and experience as a person responsible for fingerprinting suspects for the police. Officer Boggues' answer to the question was likely to help the jurors understand the basis for fingerprint collection and to aid them in comprehending why certain surfaces may or may not yield identifiable fingerprints when touched. Further, a "lay witness generally may testify to something he knows and that does not require expert testimony to establish . . . ." *Howard v Feld*, 100 Mich App 271, 273; 298 NW2d 722 (1980). The simple nature of this question and answer also appear to be within the knowledge of an ordinary person who has likely seen his or her fingerprints transferred to a clean surface many times.

Third, Michigan follows a rule of harmless error that requires the challenged evidence to result in a miscarriage of justice under a more likely than not standard in order to justify reversing a conviction. See *People v Lukity*, 460 Mich 484, 493-495; 596 NW2d 607 (1999). In other words, if there was an error at trial, it only requires reversing Williams' conviction if the error was prejudicial and outcome determinative in light of the properly admitted evidence. *Id*. at 495-496.

Although Williams claims that the questioning was prejudicial, that is not evident from the record. Quite significantly, the testimony regarding fingerprints resulting from oils on the skin was correct according to a qualified fingerprint expert who testified later in the trial. Thus, if the testimony did influence the jury, it did so in a permissible way by correctly informing the jury of a fact generally relevant to assessing the evidence. MRE 701(b). Additionally, even though the second question regarding the detection and identification of fingerprints was more

within the province of an expert because it would not be a matter of common knowledge, Officer Boggues never answered the question. The other questions the prosecutor asked and Officer Boggues answered merely related to his qualifications as an expert and did not ask for an expert opinion.

By the time the prosecutor asked the questions to which the defense attorney objected, Officer Boggues had already testified regarding the relatively limited scope of his knowledge, eliminating any possibility that the jury might give his answers more credence than they were worth. Although Williams argues that the testimony "neutralized" the cross-examination — an argument that can be interpreted as claiming prejudice — there is no evidence on the record that the jury was aware that Officer Boggues might be prohibited from testifying as he did. In other words, the prosecutor did not attempt to inflate the importance and validity of Officer Boggues' testimony by claiming that he was an expert, which minimized any unfairly prejudicial effect.

Further, the prosecutor elicited only a very small amount of testimony from Officer Boggues regarding fingerprint evidence. Williams himself elicited the majority of the fingerprint evidence from Officer Boggues in order to establish a reasonable doubt about police procedures used to collect physical evidence to prove his identity as the perpetrator. To paraphrase this Court in *People v Ward*, 133 Mich App 344, 355; 351 NW2d 208 (1984), Williams' efforts to use this fingerprint testimony to his advantage "negated" any possible prejudice that could stem from the testimony. Most importantly, Officer Boggues' testimony was not likely to have affected the outcome in this case, whether elicited by Williams or the prosecutor, because the homeowner and her mother testified that Williams perpetrated the charged crimes. This was direct evidence of Williams' guilt. We conclude that the trial court did not err in allowing Officer Boggues' fingerprint testimony.

C. Officer Puckett's Testimony

Williams argues that the trial court erroneously permitted the prosecutor to elicit irrelevant testimony from Officer Puckett regarding the FBI's fingerprint identification standards. MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The evidence regarding the FBI's standards was relevant because it provided a foundation for Officer Puckett's opinion that the fingerprints the police took from the homeowner's car belonged to Williams. Further, while the evidence did tend to bolster her testimony, it did so permissibly because it gave the jury a comparative understanding of the standards the law enforcement profession uses for identifying fingerprints. In other words, had Officer Puckett only testified that the Detroit Police Department uses nine points of comparison, the jury would not have been able to assess her credibility because the number nine in that context would be abstract to an ordinary person without the specialized knowledge of an expert. We conclude that the trial court did not err by admitting this testimony.

IV. Sufficiency Of The Evidence

A. Preservation Of The Issue And Standard Of Review

Williams contends that there was insufficient evidence to convict him of assault with intent to commit CSC I. A challenge to the sufficiency of the evidence for a criminal conviction may be raised for the first time on appeal, *People v Wright*, 44 Mich App 111, 114; 205 NW2d 62 (1972), because a defendant does not need to take any particular actions to preserve this issue, *People v Lyles*, 148 Mich App 583, 594; 385 NW2d 676 (1986).

When a defendant claims that the evidence was insufficient to sustain a jury verdict, review of the record is, in effect, de novo. See *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

B. Legal Standards

Evidence is sufficient when a rational factfinder could determine that the prosecution proved every element of the crimes charged beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748, amended 441 Mich 1201 (1992). Direct and circumstantial evidence, including any reasonable inferences, can prove an element of an offense equally well. *Id*. at 536. This evidence, no matter its type, must be viewed in the light most favorable to the prosecution. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995).

Assault with intent to commit CSC I, MCL 750.520g(1); MSA 28.788(7)(1), consists of four elements. *People v Snell*, 118 Mich App 750, 755; 325 NW2d 563 (1982). The prosecutor must prove that the defendant committed (1) an assault, (2) with an improper sexual purpose or intent, (3) that the act the defendant intended to commit involved "some actual entry of another person's genital or anal openings or some oral sexual act," i.e., penetration and (4) an aggravating circumstance. *Id*. However, an actual touching need not occur and "[w]hen the act involves penetration, it is not necessary to show that the sexual act was started or completed." *Id*.

C. Sexual Intent

Williams contends that the prosecution failed to provide sufficient evidence that he had a sexual intent because the homeowner conceded that he never said anything of a sexual nature and the comments he did make pointed to an intent to steal money or property. Williams is correct that a factfinder can infer a defendant's intent from his words. *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981). However, critically, Williams ignores that intent can also be inferred from the act, means, or the manner employed to commit the offense. *People v Leach*, 114 Mich App 732, 735; 319 NW2d 652 (1982).

In this case, a reasonable juror could infer Williams' intent to commit an assault involving penetration from the homeowner's testimony that Williams threw her across her bed and pulled down her undergarments, especially when this evidence is viewed in the light most favorable to the prosecutor. A reasonable juror could regard the act of removing the homeowner's undergarments as an act that was intended to facilitate penetration, rather than

mere sexual contact. That Williams eventually changed his mind about engaging in penetration does not undermine this evidence of his intent.

We note that the homeowner's testimony indicated that once she and Williams entered her bedroom Williams was not single-mindedly focused on finding things to steal and that he saw nothing to steal there. This apparently is why Williams eventually took the homeowner back to the living room. Accordingly, his intent to steal was not so clear and exclusive during this particular phase of the offense that it would be illogical for a reasonable person to conclude that he *also* had the intent to commit a sexual assault involving penetration. Viewed as a whole, the record provides sufficient circumstantial evidence and reasonable inferences to prove his intent to commit a sexual assault involving penetration beyond a reasonable doubt.

D. Aggravating Circumstances

Williams also claims that there was insufficient evidence of an aggravating circumstance. MCL 750.520g(1); MSA 28.788(7)(1) does not specifically require the prosecution to prove an aggravating circumstance. The Court in *Snell*, *supra* at 754-755, read the aggravating circumstance requirement into MCL 750.520g(1); MSA 28.788(7)(1) because it is codified with the CSC I statute, MCL 750.520b(1); MSA 28.788(2)(1), which requires an aggravating circumstance as well as penetration. In other words, the *Snell* Court implicitly concluded that the conduct made illegal in MCL 750.520g(1); MSA 28.788(7)(1) is a sexual assault coupled with the intent to commit an act prohibited by MCL 750.520b; MSA 28.788(2), which includes an aggravating circumstance.

The case law does not fully define what constitutes an aggravating circumstance. When describing the fourth element of the offense, the *Snell* Court stated that it must include "some aggravating circumstances, e.g., the use of force or coercion." *Id*. at 755. The combination of the word "some" and "e.g.," meaning for example, suggest that aggravating circumstances may consist of "force or coercion" or other factors. In the context of assault with intent to commit CSC II, MCL 750.520g(2); MSA 28.788(7)(2), Michigan courts have referred to evidence of the aggravating factors listed in the underlying CSC statute to prove this element. *People v Lasky*, 157 Mich App 265, 270; 403 NW2d 117 (1987); see also generally *People v Worrell*, 417 Mich 617; 340 NW2d 612 (1983). Force and coercion are even listed as aggravating circumstances in MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). Thus, the evidence in this case would be sufficient if it pointed to force, coercion, an aggravating circumstance listed in the CSC I statute, or some other circumstance that appears aggravating, i.e., a factor that makes the crime more serious.

The prosecutor points out that CJI2d 20.17, the instruction on this offense, informs the trial court that it must give an additional instruction to the jury on an aggravating circumstance from CJI2d 20.19 through 20.23, as the facts of the case dictate. CJI2d 20.20, which the trial court in this case actually read to the jury in the context of the separate assault with intent to commit CSC I and CSC II instructions, indicates that if the assault occurs during the commission of another felony, that is a sufficiently aggravating circumstance. Accordingly, the prosecutor contends that the evidence that Williams committed the assault in the instant case while also committing first-degree home invasion is sufficient proof on this element. We agree.

Furthermore, Williams actually used force to accomplish the assault, first binding the homeowner's hands and throwing a pillowcase over her head to compel her to submit to him and diminishing her opportunity to resist and then throwing her across the bed. The evidence of either aggravating circumstance was sufficient, when viewed in the light most favorable to the prosecutor, to convict Williams of this offense beyond a reasonable doubt.

V. Jury Instructions

A. Preservation Of The Issue And Standard Of Review

Although Williams raises several instructional issues, "[i]t is well-settled that no party may assign as error failure to give or the giving of an instruction unless objection is raised before the jury retires to consider the verdict. The objecting party must specifically state the grounds for his objection at that point." *People v Smith*, 80 Mich App 106, 113; 263 NW2d 306 (1977); see also *People v Carines*, 460 Mich 750, 762; 597 NW2d 130 (1999). The only instructional issue Williams or Jackson brought to the trial court's attention before the trial court actually instructed the jury was the request for the abandonment instruction, which the trial court declined to read. Neither Williams nor Jackson objected to the instructions as given or asked the trial court to exclude the instruction on assault with intent to commit CSC II. In fact, Jackson specifically stated on the record that he had no objection to the instructions as given. Thus, only the abandonment issue is preserved for appeal.

This Court reviews alleged instructional errors de novo. *People v Hubbard*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

B. Abandonment

Immediately after the defense rested, the trial court asked the parties if they had any special requests for jury instructions. Jackson mentioned that the theory of the defense was that Williams "aside from never having intended to commit CSC, after being told that . . . [the homeowner] was on her period, on her menstrual cycle at the time of the alleged offense, that he decided not to assault her at that point in time. So that crime in fact would have been abandoned because . . . [Williams] never touched her." The trial court indicated that it would be fine to make this argument to the jury, but expressed doubt about whether such a jury instruction existed. The prosecutor also mentioned that she was not aware of an abandonment instruction for assault with intent to commit CSC I. The parties then had a discussion with the trial court off the record, after which the trial court indicated that it would be willing to give the instruction. However, after the trial court actually compiled the instructions it intended to read to the jury, it stated:

> I was preparing the jury instructions per the commentary and I did not mention abandonment as a defense to Count II [assault with intent to commit CSC I.] It's neither factually appropriate or legally appropriate under *People v Stapf*, 155 [Mich App 491; 400 NW2d 656 (1987).] Abandonment does not apply if it results from the victim's resistance and factually, in this case, the victim's saying

> that she was on her period, I think would fall within that resistance and I don't see any evidence on this record that's been presented to factually support giving that.
>
> Also legally, several cases have held that there is not crime of an attempted assault and abandonment is a defense to an attempt. *People v Patskin* [sic: *Patskan*], 29 [Mich App 354; 185 NW2d 398 (1971), rev'd on other grounds 387 Mich 701 (1972).] In other Court of Appeals cases it basically held that there is no crime of an attempted assault so for this to be used as a defense to an assault with intent to commit CSC involving penetration, I don't think it's appropriate for the reasons as stated.

The trial court also declined Jackson's offer to create a jury instruction specific to this issue.

Williams first claims that the trial court erred as a matter of law when it determined that abandonment is not a defense to an attempted assault. See *People v Cross*, 187 Mich App 204, 206; 466 NW2d 368 (1991). Williams essentially reasons that because it is possible to abandon an attempt to commit a battery and an attempted battery can constitute an assault, then it is possible to abandon an assault. Second, Williams, presuming that the abandonment defense is available, argues that the trial court inappropriately made a factual determination that he did not abandon the attempted battery and, therefore, the defense did not apply in his case.

Williams is correct that the trial court erred when it ruled that the crime of attempt to assault does not exist, but it is unnecessary to go through the individual steps of his reasoning to reach that conclusion because case law specifically addresses this point. In *People v Jones*, 443 Mich 88, 90, 91-99; 504 NW2d 158 (1993), the Michigan Supreme Court affirmed a conviction for attempted felonious assault, under MCL 750.92; MSA 28.287 and MCL 750.82; MSA 28.277. Justice Griffin, writing for the unanimous *Jones* Court, dismissed the notion that there can be no attempted assault as "rooted in semantics . . . stem[ming] from the definition of assault as attempted battery," which was an outdated concept. *Id*. at 92. Instead, Justice Griffin explored the common law roots of assault, noting that the concept of an assault has evolved over time from an attempted or failed battery to a separate, substantive offense. *Id*. at 91-95. Thus, the trial court incorrectly concluded that it could not issue an abandonment instruction *because* Michigan law does not recognize an attempted assault.

Nevertheless, the trial court did not err when it concluded that the abandonment instruction was inappropriate in this case. Abandonment is an affirmative defense. *People v Vera*, 153 Mich App 411, 416; 395 NW2d 339 (1986). To avail himself of this affirmative defense, Williams shouldered the burden of proving "by a preponderance of the evidence that he . . . voluntarily and completely abandoned his . . . criminal purpose." *Id*. at 416-417.

> Abandonment by the defendant is 'voluntary' when it is the result of repentance or a genuine change of heart. On the other hand, the defendant is not entitled to the defense if [his] motivation for withdrawal was that [he] feared arrest, realized that [he] lacked an essential instrumentality to complete the crime or for some other reason could not successfully proceed, or if [he] merely postponed [his] criminal endeavor until a better opportunity presented itself. [*Cross, supra* at 206-207.]

Similarly, a defendant is not entitled to rely on this defense if he ceases his attempt to commit the crime because the victim resists. *Id*. at 206, citing *People v Kimball*, 109 Mich App 273, 286; 311 NW2d 343, modified on other grounds 412 Mich 890 (1981).

Williams claims that the trial court encroached on the factfinder's role by making the factual determination that there was no evidence of abandonment, contrary to the evidence that he ceased the assault before he committed a sexual penetration. In *People v Reed*, 393 Mich 342, 349-351; 224 NW2d 867 (1975), the Michigan Supreme Court explained that a judge may not rule on an essential element of the crime in a jury trial, thereby depriving the factfinder of its role. However, the Court in *Reed* was speaking of a situation in which the trial court actually assesses the evidence for itself and makes a ruling on the basis of its perspective on the facts and circumstances of the case. To the contrary, when a trial court examines the record to determine if there is any evidence to support a defense theory — which it must do before deciding whether the record would support the instruction, *People v Lemons*, 454 Mich 234, 245, n 14, 257, n 27; 562 NW2d 447 (1997) — it does not have to weigh the evidence in any respect. Rather, the case law does not prescribe any guidelines for assessing the sufficiency of the evidence on the record necessary to support a related jury instruction. Therefore, it stands to reason that if there is *any* evidence to support the theory, then the trial court must give the instruction and allow the jury to determine the facts regardless of the weight of that evidence. See, e.g., *People v Lester*, 406 Mich 252, 254; 277 NW2d 633 (1979). Indeed, the trial court's statement here that there was no factual basis for the defense did not, itself, rely on weighing the evidence. The trial court merely noted that there was a complete absence of this sort of evidence on the record.

Further, Williams improperly relies on *People v McNeal*, 152 Mich App 404; 393 NW2d 907 (1986), for the proposition that abandonment is solely a question for the jury. *McNeal* addressed the abandonment issue in the context of the defendant's argument that the evidence was insufficient to convict him of assault with intent to commit CSC II because there was evidence that he abandoned the assault before committing sexual contact. *Id.* at 414-415. The Court concluded that the evidence was sufficient to put the defendant's guilt or innocence in the hands of the jury, which was then able to weigh the evidence and conclude that he was guilty. *Id*. The Court in *McNeal* did not address the trial court's role in examining the evidence adduced at trial in order to determine whether to issue an abandonment instruction. We note, as the Court did in *Snell*, *supra* at 755, that it is not necessary for a defendant to commence a sexual penetration in order to commit this crime. Thus, it would be illogical for the courts to conclude that every time a defendant fails to commit the sexual penetration, or the sexual contact, that he or she has "abandoned" the offense and therefore is entitled to this instruction.

Given the limitations on what constitutes voluntary abandonment — meaning the absence of resistance, fear of arrest, etc. — Williams had to show evidence on the record that he had a "genuine change of heart" independent of the circumstances in which he found himself when attempting to commit the sexual assault. *Cross*, *supra* at 206-207. Williams failed to point to any evidence of this sort of "repentance." *Id*. at 206. The circumstances directly surrounding the attempted sexual assault — including the homeowner's entreaties not to commit a battery and Williams' reaction when he found out that she was menstruating — demonstrate that the homeowner's resistance and other factors outside of his control persuaded him to stop. In other words, the record merely shows that "the intervention of outside forces" forced Williams to stop

his attack before committing the apparently intended sexual penetration. *Kimball*, *supra* at 280. Without evidence supporting voluntary abandonment, the trial court was not obligated to give an instruction on that theory.[5]

C. CSC I Instruction

Williams claims that the trial court's instructions on the offenses of assault with intent to commit CSC I were confusing. The trial court stated:

> In Count II, Mr. Williams is charged with Assault with Intent to Commit Criminal Sexual Conduct Involving Penetration.
>
> To prove this charge, the prosecution must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant attempted to commit a battery on [the victim], or did an illegal act that [made the victim] reasonably fear an immediate battery. A battery is a forceful or violent touching of a person or something closely connected with the person.
>
> Second, that the defendant intended either to injure the complainant, [the victim], or intended to make [the victim] reasonably fear an immediate battery.
>
> Third, that at the time the defendant had the ability to commit a battery, appeared to have the ability or thought he had the ability.
>
> Fourth, when the defendant assaulted [the victim], the defendant *intended to commit a sexual act involving criminal sexual penetration.* This means that the defendant must have intended some actual injury [sic: entry] into one person's vagina, anus, or mouth with another person's penis, finger or tongue, or any other object. It is not required that the defendant actually begin to commit the sexual act. To prove this charge the prosecutor must prove the defendant made an attempt or threat while intending to commit the act. An actual touching or penetration is not required. To prove this charge the prosecutor must prove that the defendant committed the assault *and intended to commit criminal sexual conduct.*

[5] The evidence in this case suggests that the assault with intent to commit CSC I was complete when Williams took the homeowner into her bedroom and made her fear a sexual assault involving penetration. This likely occurred no later than when he threw her across the bed and almost certainly no later than when he removed her undergarments. Nevertheless, *Jones*, *supra* at 103, states that a jury can properly convict the defendant of an attempt even after the offense is complete. Accordingly, one might argue that the trial court still would have had an obligation to give the abandonment instruction when there was evidence of a completed offense as long as the record demonstrated some evidence of voluntary abandonment. There simply was no such evidence in this case.

> The fifth element of the offense is that the alleged assault occurred under circumstances that also involved a Home Invasion in the First Degree which has already been defined for you. [Emphasis supplied.]

Williams claims that referring to an intent to commit criminal sexual conduct near the end of the instruction confused the jury in light of the previous reference to an intent to penetrate and that it inappropriately allowed the jury complete freedom to define the requisite intent.

The instruction the trial court gave substantially complied with CJI2d 20.17 and the variance, the reference to an intent to commit criminal sexual conduct, appears inadvertent. There is little likelihood that this "slip of the tongue" by the trial court affected the jury's ability to determine that Williams had the requisite specific intent to commit sexual penetration in light of: (1) the trial court's full definition of what constitutes penetration, (2) the reference to the correct intent in the instructions *and* on the jury verdict slip, and (3) the title of the offense, which trial court mentioned at the outset. See *People v Gray*, 66 Mich App 101, 107; 238 NW2d 540 (1975). Thus, for this unpreserved, constitutional issue, Williams has not established a plain error that affected his substantial rights. *Carines*, *supra* at 761, 774.

D. CSC II Instruction

Williams claims that the trial court erred in instructing the jury on assault with intent to commit CSC II because there was no evidence of an aggravating element to this offense. See *Lasky*, *supra* at 269-270. His argument is meritless because, as noted above, there were aggravating circumstances in this case: he committed the assault while perpetrating a felony and used force against his victim. Although some might read Williams' argument to imply that there was no evidence that he actually *intended* to use force, Williams never claimed that binding the homeowner's hands or throwing her across the bed was an accident. The nature of those acts suggest that he did have the intent to commit them, i.e., to add an aggravating circumstance to the assault. We conclude that the trial court did not err when it gave this instruction.

Williams also contends that the trial court erred when it failed to define sexual contact as "intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(k); MSA 28.788(1)(k). Instead, the trial court omitted the word "reasonably." "A judge's incorrect recitation of the law undermines the purpose of jury instructions." *People v Butler*, 413 Mich 377, 386; 319 NW2d 540 (1982). However, no prejudice requiring reversal could have flowed from this unpreserved error because the jury convicted Williams of the greater offense, assault with intent to commit CSC I, which did not require the jury to find that he intended to commit sexual contact as defined by MCL 750.520a(k); MSA 28.788(1)(k).

The argument is also somewhat difficult to understand in that Williams claims that without the word "reasonably" in the instruction, "the jury could have convicted [him] based on a belief that the intended touching was *unreasonably* intended to provide sexual arousal or gratification – in other words, that the jury could have convicted defendant because they perceived him as aberrant or 'kinky.'" However, the word "reasonably" in MCL 750.520a(k);

MSA 28.788(1)(k) does not refer to a defendant's intent or the aberrant nature of the touching. Rather, the plain language of the statute suggests that reasonableness refers to the factfinder's assessment of the evidence. Stated differently, the jurors had to be able to look at the evidence and reach only logical or "reasonable" conclusions regarding whether Williams intended the touching to be for sexual arousal or gratification, and not for some other, nonsexual purpose. If the evidence demonstrated that Williams had a sexual intent — "kinky," "aberrant," or otherwise — then a jury's conclusion that he was guilty of assault with intent to commit CSC II would be proper. Further, Williams does not support his argument with authority demonstrating that this was error requiring reversal, and appellate courts ordinarily will not make a party's case for him or her. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Thus, we conclude that there are no grounds for overturning his conviction on the basis of this unpreserved error.

VI. Ineffective Assistance Of Counsel

A. Preservation Of The Issue And Standard Of Review

In the post-conviction proceedings, Williams argued that his attorney was ineffective and moved for a new trial, preserving this issue for appeal. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Because this Court reviews the record directly to determine whether a defendant has a raised a successful ineffective assistance claim, review is de novo. See, e.g., *People v Shively*, 230 Mich App 626, 628-629; 584 NW2d 740 (1998).

B. Hybrid Representation

Williams had a form of hybrid representation at trial in which he acted as "lead counsel" with Jackson's assistance as "second chair." In light of this arrangement, Williams first claims that even though he proceeded in propria persona he can assert his right to effective assistance of counsel under US Const, Am VI and Const 1963, art 1, § 20 with respect to those areas in which Jackson acted on his behalf. Second, Williams contends that Jackson was ineffective for failing to request certain jury instructions on lesser offenses. Without deciding whether a defendant can raise an ineffective assistance of counsel claim in this context, we address the claim's substance.

C. Right To Effective Assistance

A defendant in a criminal case has the right to effective assistance of counsel under the state and federal constitutions. US Const, Am VI; Const 1963, art 1, § 20. A defendant in a criminal case also has the right to proceed to trial without counsel. Const 1963, art 1, § 13; MCL 763.1; MSA 28.854; see *Faretta*, *supra* at 819-820. Once a defendant decides to exercise the right to self-representation voluntarily, knowingly, and intelligently, a defendant cannot claim that his or her own performance at trial, no matter how unskilled, denied him or her of this right to effective assistance of counsel. *Faretta*, *supra* at 834, n 46; *Dennany*, *supra* at 438, n 14, quoting *Faretta*. To merit reversing a criminal conviction on the basis of ineffective assistance of counsel, a defendant must demonstrate "that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant faces a heavy burden to prove such a claim because the courts presume that trial

counsel rendered effective assistance, *People v Harris*, 185 Mich App 100, 104; 460 NW2d 239 (1990), and the challenged action was proper trial strategy, *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

D. Lesser Theft Instructions

Count I of the criminal information charged Williams with first-degree home invasion. MCL 750.110a(2); MSA 28.305(a)(2). Williams argues that Jackson should have asked the trial court to instruct the jury on second-degree home invasion, MCL 750.110a(3); MSA 28.305(a)(3), a fifteen-year felony, and larceny over $100, MCL 750.356; MSA 28.588,[6] a five-year felony, because the defense strategy was to submit lesser offenses to the jury. Williams' argument lacks merit because the record indicates that Jackson's strategy was "all or nothing" for the home invasion count, meaning that the jury had the option of believing that Williams committed the aggravated home invasion or that he was simply not the perpetrator. Specifically, the trial court said, "As to Count I, the Home Invasion First Degree. I don't see any lessers that would be appropriate so that's all or nothing." Jackson replied, "That's correct, Your Honor." The trial court's statement and Jackson's concurrence were consistent with the lack of a defense theory of the case and the absence of evidence supporting conviction of a lesser theft offense.

Because the trial court did not grant Williams' motion for a *Ginther* hearing, there is no record from which this Court could conclude that this failure to request a lesser offense instruction was anything but strategy. *Tommolino*, *supra* at 17. That Jackson was aware that he could ask for instructions on lesser offenses and did so with respect to the assault count certainly suggests that this was a deliberate trial tactic, which this Court will not "second-guess." *People v Emerson*, 203 Mich App 345, 348; 512 NW2d 3 (1994). In general, this sort of "all or nothing" strategy is legitimate, *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1983), and, simply because it failed, does not mean that counsel's conduct was constitutionally deficient, see *People v Bart (On Remand)*, 220 Mich App 1, 15, n 4; 558 NW2d 449 (1996).

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[6] At the time Williams committed the offenses in this case, the larceny statute, MCL 750.356; MSA 28.588, read:

> Any person who shall commit the offense of larceny, by stealing, of the property of another, any money, goods or chattels, or any bank note, bank bill, bond, promissory note, due bill, bill of exchange or other bill, draft, order or certificate, or any book of accounts for or concerning money or goods due or to become due, or to be delivered, or any deed or writing containing a conveyance of land, or any other valuable contract in force, or any receipt, release or defeasance, or any writ, process or public record, if the property stolen exceed the value of $100.00, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by fine of not more than $2,500.00. If the property stolen shall be of the value of $100.00 or less, such person shall be guilty of a misdemeanor.

E. Lesser Assault Instructions

Williams claims that Jackson was ineffective for failing to request instructions on attempted CSC II, MCL 750.92; MSA 28.287 and MCL 750.520c; MSA 28.788(3) and attempted CSC III, MCL 750.92; MSA 28.287 and MCL 750.520d; MSA 28.788(4), because that was the only way to give the jury the option of convicting him of five-year felonies while still permitting the abandonment instruction.

This argument is also without merit. Williams cannot demonstrate prejudice from Jackson's failure to request these instructions. *Pickens, supra* at 302-303. As discussed above, the evidence did not support an abandonment instruction. If it did, the trial court could have instructed the jury on abandonment as a defense in conjunction with the two assault with intent to commit CSC instructions it actually issued. Williams does not identify anything about the crimes of attempted CSC II and III that would have permitted an abandonment instruction without evidence supporting that theory. Furthermore, Jackson did request instructions on the lesser offense of assault with intent to commit CSC II, MCL 750.520g(2); MSA 28.788(7)(2), which is a five-year felony. That the jury did not convict Williams of the lesser offense does not mean that Jackson was ineffective. *Bart (On Remand), supra* at 15, n 4.

VII. Resentencing

A. Preservation Of The Issue And Standard Of Review

Williams claims that he is entitled to resentencing for two independent reasons. First, he claims that the trial court erroneously enhanced his sentence under the habitual offender statute, MCL 769.12; MSA 28.1084, even though the prosecutor failed to file the enhancement notice with the trial court within the twenty-one day period following his arraignment pursuant to MCL 769.13; MSA 28.1085. Second, Williams argues that he must be resentenced because the trial court failed to credit his current sentences with the time he was awaiting trial and sentencing in jail. Williams also contends that, if he is not entitled to sentence credit because he was on parole when he committed this offense, he is at least entitled to credit for the four days he spent in jail before the Department of Corrections issued a parole hold.

Williams raised the habitual offender enhancement filing issue at sentencing. Therefore, he preserved this issue for review. See generally *People v Connor*, 209 Mich App 419, 422-423; 531 NW2d 734 (1995). Williams did not raise the issue of sentence credit in the lower court and, therefore, did not preserve this issue for appeal. *Id*. at 431.

Each issue implicates the interpretation and application of statutes, so this Court must apply review de novo. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). To the extent that the issues being appealed require this Court to review the trial court's factual findings, review is for clear error. MCR 2.613(C).

B. Habitual Offender Sentence Enhancement

MCL 769.13; MSA 28.1085 states in pertinent part:

> (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, *by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment* on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.
>
> (2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. *The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1).* The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings. The prosecuting attorney shall file a written proof of service with the clerk of the court.
>
> (3) The prosecuting attorney may file notice of intent to seek an enhanced sentence after the defendant has been convicted of the underlying offense or a lesser offense upon his or her plea of guilty or nolo contendere if the defendant pleads guilty or nolo contendere at the arraignment on the information charging the underlying offense, or within the time allowed for filing of the notice under subsection (1). [Emphasis supplied.]

This statue provides a "bright-line test" for filing a supplemental information to enhance a sentence. *People v Bollinger*, 224 Mich App 491, 492; 569 NW2d 646 (1997).

Williams was arraigned on October 2, 1996. Precisely twenty-one days later, someone – presumably from the prosecutor's office – took the habitual offender enhancement notice to the Recorder's Court Clerk's Office on October 23, 1996, where it was time and date stamped at 4:34 p.m. According to the parties' stipulation, on October 23, 1996 the Clerk's Office closed at 4:30 p.m. However, the time and date stamp was available in an unlocked area of the office. What happened to the notice after it was time and date stamped cannot be determined. There is literally no evidence in the record that the enhancement notice was given to court personnel or otherwise delivered to the court before the time for filing expired. No copy of the enhancement notice appears in the lower court record at any time before sentencing in this case, which occurred about nine months after arraignment. Neither the prosecutor nor the defense produced the original, signed notice, much less provided any evidence that the original was placed in the record at any time. There are no docket entries that indicate that the clerk of the court processed the notice on or around October 23, 1996. Only at sentencing, when defense counsel objected to the enhancement and provided the trial court with a copy of the notice, did the trial court receive a copy of the enhancement notice.

As noted above, Williams' appellate counsel filed a postjudgment motion in the trial court asserting the same argument Williams raises here: that the failure to file the notice within twenty-one days of arraignment was a per se violation of MCL 769.13; MSA 28.1085 regardless of Williams' actual notice of the prosecution's intent to seek sentence enhancement. The trial court denied the motion for resentencing, ruling that the late time stamped on the enhancement did not prove that "an unauthorized person received the notice. Believe it or not, some administrators and some staff work three minutes late. And it's just speculation to conclude that an authorized person did not receive the filing of the enhanced notice."

The habitual offender filing statute, MCL 769.13; MSA 28.1085, places the burden of filing a sentence enhancement notice on the prosecutor in subsection one and then, in subsection two, says that "[t]he notice *shall* be filed with the court *and* served upon the defendant or his or her attorney within" twenty-one days of arraignment. The word "shall" in the statute "indicates a mandatory, nondiscretionary provision," *People v Seeburger*, 225 Mich App 385, 392; 571 NW2d 724 (1997), which is consistent with this Court's ruling in *Bollinger*, *supra* that the statute creates a "bright-line" rule for filing and does not accommodate late filings.

People v Walker, 234 Mich App 299, 313; 593 NW2d 673 (1999), which held that the prosecution did not violate the defendant's federal and state constitutional rights to due process of law because the prosecution failed to file the proof that it had served the notice of enhancement on the defendant, does not loosen this standard. *Walker* did not construe the statute or any applicable court rules. Further, unlike in the situation in *Walker*, Williams only asks this Court to order the trial court to resentence him, not to overturn his convictions, on the basis of the filing error. Thus, the plain language of the statute controls in this case and it absolutely requires both filing in the court *and* notice to the defendant; one without the other will not suffice. See generally *People v Borchard-Ruhland*, 460 Mich 278, 284-285; 597 NW2d 1 (1999).

MCL 769.13; MSA 28.1085 does not define what constitutes filing with the court. However, MCR 2.107(G) states that

> [t]he filing of pleadings and other papers with the court as required by these rules must be with the court clerk, except that the judge may permit papers to be filed with him or her in which event the judge shall note the filing date on the papers and forthwith transmit them to the office of the court clerk. [See also MCR 6.001(D) (rules of civil procedure ordinarily apply in criminal cases); MCL 600.194; MSA 27A.1974 (codifying substance of MCR 2.107).]

In *Walker-Bey v Dep't of Corrections*, 222 Mich App 605; 564 NW2d 171 (1997), this Court construed MCR 2.107(G) in light of a sixty-day filing deadline for prisoner appeals in contested cases, MCL 791.255; MSA 28.2320(55)(2). The Court rejected the "prisoner mailbox rule," which would count the day a prisoner hands the document to prison officials as the day of filing, reasoning that MCR 2.107(G) "unambiguously" required delivering the document to the court clerk or the judge within the statutory period. *Id*. at 609. Thus, *Walker-Bey* suggests that a document must actually reach the court clerk or the trial judge in order to be "filed."

Walker-Bey's lesson comports with this Court's statement in *Biafore v Baker*, 119 Mich App 667, 669; 326 NW2d 598 (1982),[7] that "[a] paper or document is filed when it is delivered to and received by the proper officer to be kept on file, and the endorsement of the officer with whom it is filed is but evidence of the time of filing." This rule has a long-standing history. See *People v Purofoy*, 116 Mich App 471, 485-486; 323 NW2d 446 (1982), quoting *People v Madigan*, 223 Mich 86, 89; 193 NW 806 (1923) and 36A CJS 396-398 (filing requires delivery to *and* receipt by a proper official); see generally *Jackson City Bank & Trust Co v Frederick*, 271 Mich 538, 543; 260 NW 908 (1935) (a document is filed when it is "tendered to the county clerk for filing."). While not dispositive in this case, even our own operating procedures require a party to deliver a document to Court personnel in order to file it. See IOP 7.202(5), 231 Mich App lxiv (1998) ("A document is 'filed' when it is delivered to the clerk of the court and accepted by the clerk with the intent to enter it in the record. . . ."). Thus, delivery is a necessary component of filing.[8]

As noted above, the parties dispute whether the prosecution filed the enhancement notice with the Recorder's Court Clerk. Three separate factors indicate that an authorized official never received the enhancement notice and, as a result, the prosecution did not "file" the notice within the meaning of MCR 2.107.

First, according to the parties, the time and date stamp sits in an unlocked portion of the Recorder's Court Clerk's Office that is open to the public and may not be operated by court staff. Accordingly, even though the time and date stamp may be genuine, this says nothing about whether a proper person *received* the notice. See *Biafore*, *supra* at 669; see generally *Magnuson v Zadrozny*¸ 195 Mich App 581, 585-587; 491 NW2d 258 (1992) (in the context of serving notice on an adverse party, a court's date stamp does not definitively establish the time of every legal action).

Second, in the case law that implicitly applies a presumption that a document is filed on the same day it is stamped, the courts have never had to confront a situation in which the allegedly timely filed document failed to reach the lower court record by the efforts of the party filing it. The courts in question under the case law indisputably received the documents at issue. See, e.g., *Walker-Bey*, *supra*; *Biafore*, *supra*; *Hollis v Zabowski*, 101 Mich App 456, 457; 300 NW2d 597 (1980). As a result, the question was always *the time* at which the party filed the document and not *whether* the party filed the document. Whatever presumption of regularity existed in those cases concerned the internal operations of each court and its personnel. Because

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[7] GCR 1963, 107.7, in force at the time this Court decided *Biafore*, was substantively identical to MCR 2.107, and read, "Filing with the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the office of the clerk of the court, except that the judge may permit the papers to be filed with him, in which even he shall note thereon the filing date and forthwith transmit them to the office of the clerk of the court."

[8] Whether the court clerk accepts a document may also be relevant when determining whether a party filed the document. However, because the parties to this case do not raise acceptance as an issue, we do not rule on that basis.

the document at issue in these other cases actually made its way into the lower court record, the courts were able to presume that any irregularities in the manner of filing were due to actions by court personnel and, therefore, the parties had completely discharged their respective duties to file the relevant document in the prescribed manner.

This case presents a vastly different problem because it calls into question the steps the *prosecutor's* staff took to file the enhancement notice rather than how the court personnel treated the notice once it was delivered into their hands. There are any number of good reasons to assume that court staff abide by the court rules and deal with filings in a regular and proper manner. However, we are unaware of any authority that applies a presumption of regularity to a *party's* conduct. Such a presumption would, in any event, be inconsistent with the notion of an adversarial system of justice in which the parties have an incentive to maximize the time available to prepare pleadings, briefs, and other materials submitted to the courts.

In this case, we have absolutely no evidence that the prosecutor attempted to avoid the filing requirement in bad faith. Yet, the original notice *never* made its way into the trial court record. When a copy did appear in the record, it was well-past the twenty-one day period. If court staff had controlled the time and date stamp, we would be able to infer that the prosecutor filed the enhancement notice on time, regardless of the time and date actually stamped on the notice. In this scenario, there would be no way to acquire the time and date stamp without delivering the notice into the hands of the court staff. However, the trial court record leaves us no way to determine whether the prosecutor actually delivered the notice to court staff, effectively filing it. Thus, whatever irregularities forced this unusual problem in the trial court record occurred outside the Clerk's Office and we have no reason to apply a presumption of regularity to overcome the deficient filing.

Third and finally, the prosecutor never introduced any evidence in the trial court, be it an affidavit or testimony, that someone from prosecution left the notice at the Clerk's Office in a place designated for filing or with a person authorized to receive documents for filing. See generally *Krone v Balsis*, 163 Mich App 555, 557-558; 415 NW2d 867 (1987). That a person signed the bottom of the notice sentence declaring that the notice "was also filed in the Recorder's Court by personal service," does not prove that the proper official received the notice at any time, much less within twenty-one days of arraignment. *Hollis*, *supra* at 457-458. Presumably, this additional statement was added to the notice at the time the notice was prepared and, therefore, did not represent historical fact. Stated another way, it would be consistent with common practice among lawyers and legal staff to prepare such a statement mentioning the date the document "was" filed in advance of actually filing the document. Thus, it is as likely that the statement on the enhancement notice is an expectation of what the person writing the note believed would occur in the future as it is likely to be a representation of what had already happened. In any event, given the confusion over what constitutes "filing" in this matter, the conclusory statement that the notice "was also filed" failed to describe the unknown person's activities in sufficient detail for us to conclude that this form of "filing" included delivering the notice to the appropriate court personnel or leaving it in an appropriate place.

In sum, there is no evidence from which to conclude the true facts surrounding the attempted filing. Our conclusion would be no different if the time stamped on the copy of the

notice was clearly within the court's working hours because there is no evidence that the notice was ever formally submitted to the court, i.e., filed, as the statute plainly requires. Thus, the trial court's conclusion that the prosecutor met the requirements of the statute was clearly erroneous. See generally *People v Faucett*, 442 Mich 153, 170; 499 NW2d 764 (1993) (a court clearly errs when the record does not support its legal conclusion). Having failed to file the enhancement notice with the trial court on time, the prosecutor was not entitled to seek an enhanced sentence for Williams and the trial court erred in imposing an enhanced sentence despite this error.

C. Sentence Credit

Williams claims that he was incarcerated pursuant to MCL 791.238; MSA 28.2308 or MCL 791.239; MSA 28.2309, statutes that address arrest for parole violations, while awaiting trial in this case. If he was held under MCL 791.238; MSA 28.2308, then Williams claims that he is entitled to credit for the entire time he was in jail before sentencing. If he was held under MCL 791.239; MSA 28.2309, then Williams claims that he is entitled to four days' credit, which accounts for the time he was in jail before the Department of Corrections issued his parole "hold."

Williams completely misses the mark with his argument. He correctly asserts that he is entitled to credit for the time spent in jail. However, any credit is applied to the sentence Williams was serving when he was paroled and committed the instant offense, and not against his new sentences. MCL 791.238(2); MSA 28.2308(2); *People v Stewart*, 203 Mich App 432, 434; 513 NW2d 147 (1994). Therefore, it is not necessary to construe the statutes he cites or to remand for resentencing on this basis.

VIII. Cumulative Error

On the basis of the foregoing, we conclude that Williams failed to identify any errors at trial, much less ones that, when considered cumulatively, denied him a fair trial. See *In re EP*, 234 Mich App 582, 599; 595 NW2d 167 (1999). Thus, we have no legal foundation to reverse his convictions.

Convictions affirmed but sentence vacated. Remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Helene N. White
/s/ Kurtis T. Wilder